82-1165

NO. 82-

IN THE

Supreme Court of the United States

October Term, 1982

JAMES H. CORDER and HARRY W. WESTERN, on Behalf of Themselves and all Others Similarly Situated,
Petitioners,

vs.

ROBERT H. KIRKSEY, Individually and as Probate Judge of Pickens County; et al., etc.
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BURT NEUBORNE
CHARLES S. SIMS
New York, NY 10036

EDWARD STILL
Birmingham, AL

NEIL BRADLEY*
LAUGHLIN MCDONALD
CHRISTOPHER COATES
52 Fairlie Street, NW
Atlanta, GA 30303
[404] 523-2721
American Civil Liberties Union Foundation, Inc.

**Counsel of Record*

QUESTIONS PRESENTED

1. Whether the opinion and judgment of the court of appeals finding constitutional a local act providing at-large elections for the Pickens County, Alabama, county commission, should be summarily vacated and remanded because the court of appeals never addressed or decided petitioners' properly pleaded claim, that the at-large scheme was in violation of Section 2 of the Voting Rights Act, 42 U.S.C. §1973?

2. Whether a school board election feature requested by a school board based upon a statute to which the Attorney General has interposed an objection under §5 of the Voting Rights Act, was improperly incorporated into the district court order under McDaniel v. Sanchez, 452 U.S. 130 (1981)?

3. Whether the district court and court of appeals erred under prior decisions of this Court in implementing and approving a plan of apportionment for a school board including features that are contrary to state law and on a justification totally without evidentiary support?

PARTIES BELOW

The following were parties below:

Plaintiffs-appellants:

James H. Corder and Harry W. Western, on behalf of themselves and all others similarly situated;

Defendants-appellees:

Robert H. Kirksey, Individually and as Probate Judge of Pickens County; H. Hope Wheat, Individually and as Circuit Clerk and Register of Pickens County; Louie C. Coleman, Individually and as Sheriff of Pickens County, Aubrey Turnipseed, Travis Fair, Groce Pratt and Richard Walters, Individually and as the County Commissioners of Pickens County; Billie F. McCool, T.B. Woodard, Jr., J.L. Stone, Marvin Elmore, and J.V. Park, Individually and as members of the Pickens County Board of Education.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 639 F.2d 1191, and appended hereto at 1a.

The denial of the petition for rehearing and suggestion for rehearing en banc is reported at 688 F.2d 991, and appended hereto at 25a.

Two previous opinions of the court of appeals remanding the case are reported at 625 F.2d 520 and 585 F.2d 708, and are appended hereto at 100a and 53a respectively.

There are seven opinions or orders of the United States District Court for the Northern District of Alabama, all of which are unreported. They are appended hereto.

JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit* sought to be reviewed was entered on March 16, 1981. A timely petition for rehearing and suggestion for rehearing en banc were denied on October 12, 1982.

This Court has jurisdiction to review the opinion below pursuant to 28 U.S.C. §1254(1).

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*Former Fifth Circuit Case. Section 9(1) of Public Law 96-452.

STATUTES INVOLVED

The issues presented by this petition involve Section 2 of the Voting Rights Act, 42 U.S.C. §1973, and the statute creating the at-large general election feature for the Pickens County, Alabama county commission, Act No. 141, Acts of Alabama, 1967 Regular Session, p. 476. They are appended hereto at 109a and 111a respectively.

Statutes involving the Pickens County, Alabama school board are Act No. 141, Acts of Alabama, 1949 Regular Session, p. 167, 116a, Act No. 41, Acts of Alabama, 1966 Special Session, p. 64, 121a, Act No. 72, Acts of Alabama, 1975 Fourth Special Session, p. 2694, 124a, and §16-8-4, Code of Alabama (1975), 130a.

STATEMENT OF THE CASE

The Reverends James H. Corder and Henry W. Western are black citizens and voters of Pickens County, Alabama. They filed suit in 1973 on behalf of all black citizens of Pickens County challenging the apportionment and method of election of the county commission and county school board. Their challenge was based on 42 U.S.C. §1973, 1973c, 1983, 1985(3), and the first, thirteenth, fourteenth, and fifteenth amendments, R1. Jurisdiction in the district court was invoked under 28 U.S.C. §§ 1331 and 1343.

A. The County Commission[1]

The county commission consisted of five members, four nominated from

1. For clarity, the commission and school board will be discussed separately, though for the most part both bodies were dealt with in the same opinions.

single-member districts,[2] but elected at-large in the general elections, with the fifth member, its chairman, being the county probate judge, nominated and elected at-large. The districting and method of election were set out in Act 141, Acts of Alabama, 1967 Regular Session, 111a, which repealed and reenacted a 1935 statute.

Plaintiffs challenged the apportionment of the four nomination districts and the at-large feature of the general election for these four districts. R5.

After discovery, plaintiffs moved for partial summary judgment. On January 23, 1975, the district court issued an order, 28a, holding unconstitutional the

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2. In contrast to a more common form of requiring only district residence, the act provided for single-member primary vote in each of the four districts.

plans for the county commission, and retained jurisdiction

> until constitutionally acceptable apportionment plans for the County Commission and Board of Education are enacted into law and approved by the Court... 35a.

In 1975, the Alabama Legislature enacted a local act for the County Commission, Act 594, Acts of Alabama 1975 Regular Session. This act reapportioned the four single-member commission districts for primary nomination but did not alter the at-large feature of the general election.[3] Plaintiffs did not challenge the apportionment, but moved to enjoin the continued at-large general election plan of the 1967 statute, and the commission, in turn, sought court approval to implement its new statute.

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3. This act was submitted to the Attorney General under 42 U.S.C. §1973c, and the Attorney General did not interpose an objection.

On March 12, 1976, the district court entered an order concluding that the county commission statute was constitutional and ordered it into effect for the upcoming May primaries. 36a. The order included no findings of fact, and did not mention the statutory claim, Section 2 of the Voting Rights Act, 42 U.S.C. §1973.

A final order and judgment was latter issued, 45a, and amended, 49a, and plaintiffs appealed.

After oral argument, the court of appeals, on November 16, 1978, remanded the case because it felt the district court had "erred by omitting to make adequate findings of fact as to the constitutionality of the commission plan;..." 59a. Jurisdiction was retained, the findings to be made within sixty days.

The district court entered its supplemental opinion on February 16, 1979, 84a. It addressed only the standards of Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973), and concluded that plaintiffs failed to prove "that the election scheme dilutes the voting strength of blacks or that the scheme was designed to discriminate against blacks." 89a.

The appellate record was supplemented, and on August 21, 1980, the court of appeals again remanded, this time for thirty days,

> to enable the district court to reexamine the evidence, and its findings, in the light of City of Mobile, Ala. v. Bolden, [446 U.S. 55 (1980)], and to entertain any application plaintiffs may care to make to present further evidence on their claim that the at-large method of electing the county commission is unconstitutional, 625 F.2d 520, 521, 102a.

Addressing only the constitutional issue of intent, the district court again concluded, "There is no evidence that the

election scheme was designed to discriminate against blacks." 108a.

On March 16, 1981, the court of appeals issued its opinion, 639 F.2d 1191, 1a. Addressing the county commission, the court of appeals held:

> [T]he district court has found on remand that there are simply no facts in the record probative of racially discriminatory intent on the part of those officially responsible for the Pickens County Board of Commissioners at-large election scheme. Record, vol. 1 at 227. Having reviewed the record, it is apparent that those findings are not clearly erroneous. Therefore, the district court's approval of the legislatively enacted at-large scheme for the election of Pickens County's Commissioners passes constitutional muster, and plaintiffs' first contention must fail. 639 F.2d at 1195, 13a-14a.

The court of appeals did not mention plaintiffs' statutory claim, 42 U.S.C. §1973, or review any findings regarding discriminatory effects.

The plaintiffs filed a timely petition for rehearing and suggestion for

rehearing en banc on April 14, 1981, and later, with the court's permission filed a supplemental memorandum addressing Rogers v. Lodge, ___ U.S. ___, 102 S.Ct. 3272 (1982), and the amendment to Section 2 of the Voting Rights Act, 42 U.S.C. §1973.

On October 12, 1982, the court of appeals issued its final opinion 688 F.2d 991, 25a. It recited it had withheld its mandate and action on the petition for rehearing pending the Lodge decision. It concluded that Lodge did not affect its disposition of this case. There was no mention of Section 2.

B. The School Board

The statute governing school board elections was Act 41, Acts of Alabama, 1966 Special Session. This act changed the method of election from a 1949 statute which had five single-member districts, to requiring five at-large

seats. There were four residential districts (to be identical with the county commission districts); a fifth at-large position, with no residency requirement, was to be president or chairman of the board.

Plaintiffs challenged the 1949 districts as being malapportioned, and the 1966 Act as both unconstitutional and illegally implemented without preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. §1973c. R7. Their prayer for relief requested the convening of a three-judge court and an injunction requiring compliance with Section 5.

After discovery, plaintiffs moved for partial summary judgment. On January 23, 1975, the district court issued an order, 28a, holding unconstitutional the plan for the school board and retained jurisdiction

> until constitutionally acceptable apportionment plans for the County

> Commission and Board of Education are enacted into law and approved by the Court... 35a.

In 1975, the Alabama Legislature enacted a local act for the school board, Act 72, Acts of Alabama, 1975 Fourth Special Session. That law provided five at-large seats with no residential districts, the chairman to be selected by the board members annually from its membership. 124a. This act was submitted to the Attorney General under 42 U.S.C. §1973c, and the Attorney General interposed an objection.

Plaintiffs moved for injunctive relief against the school board, and the school board, in turn, sought court approval to implement its new statute. On March 17, 1976, the court entered an order that refused permission for the school board to implement its new all

at-large statute, apparently because of the Attorney General's objection. 40a, 41a. Because of the primary scheduled for May 4, 1976, the Court felt it should fashion a reapportionment plan. Id.

While acknowledging the preference for single-member districts in court ordered plans, the court recited three "unusual circumstances which justifiy adoption of a modified single-member district plan," 42a:

> First, the short period of time remaining before the primary election is not sufficient for preparation of a plan dividing Pickens County into five districts of equal population. Secondly, although the four Commissioners' Districts of Pickens County are constitutionally apportioned, the Court declines to order the reduction of the Board of Education to four members. Thirdly, the Board of Education has indicated a preference for having one member primarily responsible for each of the four school attendance zones,...
> Id.

Consequently, the court implemented a plan that required four school board

members be nominated and elected from single-members districts, the districts to be the same as the four county commission districts, with a fifth member elected at-large. 43a.

A final order and judgment was later issued, 45a, and amended, 49a, and plaintiffs appealed.

After oral argument, the court of appeals, on November 16, 1978, remanded the case for additional findings on the school board at-large seat, being "unable to discern whether sufficient justification exists for the employment of the at-large seat." 80a. Jurisdiction was retained, the findings to be made within sixty days.

The district court entered its supplemental opinion on February 16, 1979, reiterating the shortness of time and lack of desire to reduce the board

size, and the school board's "indicated ... preference", 98a, for having one board member primarily responsible for each of the four school attendance zones.

> The election scheme of Board members has followed the high school attendance zones since at least 1949. A fifth single-member district would create a situation where one of the five districts has either no schools in it or parts of two or more such attendance zones. The imbalance of such a scheme is inherent. 99a.

The appellate record was supplemented, and after the remand (discussed above which affected only the county commission), on March 16, 1981, the court of appeals issued its opinion, 639 F.2d 1191, 1a. Addressing the at-large school board member feature, the court of appeals put aside the impending election justification.

> While this might surely justify imposition of an interim remedy, ... we refuse to hold it is sufficiently weighty to justify a permanently established, court-fashioned at-large election plan.
> 639 F.2d at 1195, 17a.
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> ...
>
> The matter of the fifth member, while problematic, seems most appropriately resolved as the district court has done. Given Alabama's expressed policy, and the structural desirability of a five-member board, it is proper that a five member board be maintained. The appropriateness of this goal, when coupled with the unique circumstances justifying maintenance of Pickens County's four-zone school system, and its overlapping constitutionally apportioned four election districts, leads to an acceptance of an at-large scheme. Since reapportionment into five districts is impractical, and because a five member board is structurally preferable, a county-wide election of the fifth member seems the most appropriate result.
> 639 F.2d at 1196, 20a-21a.

As discussed above, p. 10, rehearing was denied. The court of appeals did not mention the issues, relevant to the school board, raised by the rehearing petition.

REASONS FOR GRANTING THE WRIT

This petition presents two entirely separate issues--a question concerning the merits of plaintiffs' cause of action alleging vote dilution regarding the Pickens County, Alabama, board of commissioners, and a question concerning the remedy of plaintiffs' successful claim against the Pickens County, Alabama, school board. They will be discussed separately.

I.

The Affirmance of the Dismissal of Plaintiffs' Challenge of Vote Dilution, with no Review of the Record of Discriminatory Effects, and Without Considering Section 2 of the Voting Rights Act, 42 U.S.C. §1973, Should be Summarily Vacated and Remanded.

Plaintiffs' complaint specifically pleaded a violation of Section 2 of the Voting Rights Act, 42 U.S.C. §1973, along

with constitutional claims of vote dilution, in the at-large general election feature of the Pickens County board of commissioners.

Although as long ago as 1973 the court of appeals below decided that Section 2 required only proof of racially discriminatory effect, Toney v. White, 488 F.2d 310 (5th Cir. 1973) (en banc), (affirming a decision for plaintiffs although the district court specifically found a lack of proof of racially discriminatory purpose), that court has consistently decided voting cases on constitutional grounds without applying Section 2. E.g., Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), aff'd on other grounds sub nom. East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1975); Nevett v. Sides, 571 F.2d 209, 213, n.3 (5th Cir. 1978),

cert. den. 446 U.S. 951 (1980) (Section 2 issue held not presented for failure to plead it in complaint); Bolden v. City of Mobile, 571 F.2d 238, 242 n.3 (5th Cir. 1978); Broussard v. Perez, 686 F.2d 320 (5th Cir. 1982) (affirming findings of intentional discrimination for a fourteenth amendment violation); McMillan v. Escambia County, 688 F.2d 960, 961-62, n. 2 (5th Cir. 1982) (affirming a finding of constitutional violation; while acknowledging Section 2 requires no proof of purposeful discrimination, resolution of the Section 2 claim deferred).

Perhaps because White v. Regester, 412 U.S. 755 (1973), was decided on constitutional grounds, and because courts and litigants alike have viewed the scope and meaning of Section 2 as unsettled, the court of appeals below has never squarely resolved the issue of

the applicaton of Section 2 in a vote dilution claim. See Bolden v. City of Mobile, supra.

Although federal courts should avoid decisions on constitutional grounds if an adequate statutory ground is available Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring), "[t]he doctrine is not ironclad," Hagans v. Lavine, 415 U.S. 528, 546 (1974), see, Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 271 (1977); Rogers v. Lodge, ___ U.S. ___, 102 S.Ct. 3272 (1982). But while the court of appeals may have properly reached the constitutional claim, it erred in refusing to address the plaintiffs' statutory claim, properly pleaded and presented to the court.[4]

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4. This not the only time the court below has ruled against plaintiffs in a dilution case without deciding the Section

FOOTNOTE CONTINUED ON FOLLOWING PAGE

This Court should grant the petition for writ of certiorari, and summarily vacate and remand the case for the consideration of plaintiffs' claim under the recently amended Section 2 of the Voting Rights Act, 42 U.S.C. §1973.[5]

FOOTNOTE CONTINUED... 2 effects issue. See, Cross v. Baxter, 639 F.2d 1385 (5th Cir. 1981), 688 F.2d 279 (5th Cir.), reh. den. 693 F.2d 135 (5th Cir., 1982).

5. Section 2, while it incorporates certain features of the analysis in White v. Regester, 412 U.S. 755 (1973), unquestionably contains a different standard from that under the constitution. Not only is intent not a requirement for a statutory violation, but (1) consideration of unresponsiveness is generally to be avoided under Section 2, S. Rep. No. 97-417, 97th Cong., 1st Sess. 29, n.4, 30 (1982); H.R. Rep. No. 97-227, 97th Cong., 1st Sess. 30 (1982); (2) proof of forseeability of consequences is quite relevant evidence of a statutory violation, S. Rep. No. 97-417, supra, at 27, n. 108; and (3) Section 2 clearly protects more than merely the right to register and cast a ballot, but any act necessary to make a vote count equally with that of the vote of other citizens, S. Rep. No. 97-417, supra, at 30, n. 120; H. Rep. 97-227, supra, at 30.

II.

A

Under Prior Decisions of this Court, the District Court Erred in Ordering a Reapportionment Plan for the School Board that Included an At-Large Position.

Under the 1949 act governing school board elections, five members were elected from single-member districts. In 1966 the act governing the school board was amended to require at-large elections with four members to be residents of the county commission districts, as they were from time to time defined, and a fifth member to be elected without regard to residency. This act should have been, but never was, submitted for preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. §1973c.

After the district court declared the 1949 and 1966 acts unconstitutional, the

legislature adopted a 1975 act requiring five members to be elected at-large without regard to residency. This Act further stated:

> [T]he Board may, if it determines educationally advantageous, designate one of its members as having prime responsibility for each of the Board's four school attendance zones. However, nothing in this act shall be construed so as to require the Board to make such designations. 125a, 126a.

The Attorney General objected to the act under Section 5.

The district court ordered, and the court of appeals affirmed, a plan with four single-member districts and one at-large.[6] The court adopted the

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6. The at-large seat silently became the chairman position. The district court order merely designated an at-large seat; there was no discussion of the chairman. 43a, 44a. The court of appeals in its first opinion referred to this fifth person as "the chairman." 70a. On remand, the district court apparently assumed the at-large member was to be the chairman, 98a, and while

FOOTNOTE CONTINUED ON FOLLOWING PAGE

4-1 plan because the school board had expressed a preference for having one member primarily responsible for each of four school attendance zones. 42a.

FOOTNOTE CONTINUED... never specifically addressed, the chairmanship concept was sub silentio affirmed by the court of appeals, 17a-21a.

State law requires that county school boards annually select one of their members as president. Section 16-8-4, Code of Alabama (1975), 130a. Thus the courts below failed to comply with Connor v. Finch, 431 U.S. 407, 414 (1977), and Upham v. Seamon, ___U.S.___, 102 S.Ct. 1518, 1522 (1982), which require that in fashioning an interim reapportionment plan the federal courts modify state political policy only in a manner "necessary to cure any constitutional or statutory defects." Id.

Implementation of an At-Large School Board Seat Conflicts With Prior Decisions of this Court Which Require a Preference for Single-Member Districts.

While both courts below acknowledged the preference for single-member districts in court ordered reapportionment plans, mandated by such cases as Chapman v. Meier 420 U.S. 1 (1975); Connor v. Finch, 431 U.S. 407 (1977), Mahan v. Howell, 410 U.S. 315 (1973), they nonetheless considered the at-large seat here justified. The court of appeals held that the facts as found by the district court "reveal circumstances special enough to allow the at-large scheme of election." 639 F.2d 1196, 19a.

This is far short of the "persuasive justifications," based on "important and significant state considerations

[which] rationally mandate" that a single-member plan "cannot be adopted." Chapman v. Meier, supra, at 26-27.

The plan here simply does not rest on any state policy, or even past practice. The school board's preference is found for the first time in the 1975 statute, the statute which abolished all districts, both election and residential. The only state policy perceivable is that the state, in legislating for Pickens County, prefers at-large seats to single member districts for the school board. The statute's authorization for the school board to assign one of its members to have primary responsibility for a school attendance area is an adaptation to attempt to retain one of the de facto features of district elections. But this statute, having been objected to by the Attorney General, is

not a permissible basis for implementing a redistricting plan with an at-large seat. Rather than a "persuasive justification," this is precisely what is prohibited by Connor v. Finch, supra, Chapman v. Meier, supra, and subsequently by Upham v. Seamon, ___ U.S. ___, 102 S.Ct. 1518 (1982).

The Four Member/Four School Zone Plan is Not Based on Any Historically Significant State Policy or Uniqueness.

Reapportionment plans must and should be based in practicality, and were it not for the single member preference required by this Court, the attempt to align school board members with school attendance zones might pass muster. Chapman v. Meier, 420 U.S. 1, 26 (1975), permits deviation from this preference if there is an "historically significant

state policy or unique features" present.

The district court supported the school board's preference by stating that "while the [school attendance] zones are not congruent with the Commissioners' districts, there is a substantial overlap," 98a, and stating that "[t]he election scheme of Board members has followed the high school attendance zones since at least 1949." 99a.

The court of appeals said:

> We agree with the district court that a five-member board of education makes good sense in Pickens County. We also agree that the facts as found by the district court reveal circumstances special enough to allow the at-large scheme of election. 19a.

Initially it should be noted that while Alabama law requires school boards to be composed of five members, 97a, there is nothing in the record to indicate that an Alabama county having four school

attendance zones is unusual, much less special or unique.

Additionally, there is simply nothing in the record - no maps, no descriptions, no stipulations - that reveals the shape of school attendance zones, past or present, or the number of past zones. As best can be gleaned these statements by the district court are not accurate.

1. The 1966 act (under which members were being elected when this suit was filed) did not define districts in terms of school attendance zones, but made them identical to the county commissioners' districts, as then or in the future defined.

2. According to the school board, there were six high schools in 1969, three years after the board went from five districts to four. Brief of Appel-

lees Pickens County Board of Education, p. 11a (5th Cir. No. 76-3602).

3. According to official sources, there were nine high schools in 1949, the year the five single-member district statute was enacted.[7] It does not appear likely that the five districts followed the nine racially separate school zones. Further, when a black high school was added in 1952 there was no alteration in the school board election plan, but when the six white high schools were reduced in number to four, the five districts were reduced to four.

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7. Source: Alabama State Board of Education Educational Directory, yearly editions 1940-41 to 1972-73. In 1949 there were six white and three black high schools. In 1952, a fourth black high school was added, with no alterations in election districts. Between 1964 and 1967, two white high schools were closed, leaving four, at which time the election scheme was changed to have four residential districts. The four black and four white schools were merged or closed between 1969 and 1972, leaving four schools.

Whatever credence this idea had as a state policy or historical precedent, the district court could not have evaluated it to properly counterbalance the single-member district preference; and the historical record indicates any such policy was not divorced from the dual school system.

Under Chapman v. Meier, supra, the utilization of an at-large seat is not permissible.

B.

The Plan Below Effected a Policy Choice of the Local School Board and Should not have Been Implemented, or Should not Continue to be Utilized under Section 5 of the Voting Rights Act, 42 U.S.C. §1973c.

Because the district court effectuated a policy preference of the local school board as reflected in the 1975 statute, to implement this plan in the face of the Attorney General's objection

violated Section 5 of the Voting Rights Act, 42 U.S.C. §1973c, and conflicts with McDaniel v. Sanchez, 452 U.S. 130 (1981). In McDaniel this Court said:

> As we construe the congressional mandate, it requires that whenever a covered jurisdiction submits a proposal reflecting the policy choices of the elected representatives of the people -- no matter what constraints have limited the choices available to them -- the preclearance requirement of the Voting Rights Act is applicable. 452 U.S. at 139.

Petitioners here are in a stronger position that the plaintiffs in McDaniel v. Sanchez, for there has already been an objection interposed. While it might have been acceptable to implement that at-large seat for the 1976 elections, see, Mahan v. Howell, 410 U.S. 315, 333 (1973), the 4-1 plan should have been modified before the elections two years later, indeed for all three general elections held since 1976.

This Court should issue the writ of certiorari and summarily vacate and remand the approval of the at-large seat for the school board.

CONCLUSION

For the foregoing reasons, this Court shcuild issue the writ of certiorari, vacate the opinion and judgment below, and remand to the court of appeals for further consideration.

Respectfully, Submitted,

Edward Still
Birmingham, AL

(admitted as Wilson Edward Still, Jr.)

Neil Bradley*
Laughlin McDonald
Christopher Coates
52 Fairlie Street, NW
Atlanta, GA 30303

Burt Neuborne
Charles S. Sims
New York, NY 10036

American Civil Liberties Union Foundation, Inc.

Counsel for Petitioners

*Counsel of Record